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16 *Attorneys for Plaintiff*
17 V5 Technologies, LLC, d/b/a Cobalt Data Centers

18 UNITED STATES DISTRICT COURT

19 DISTRICT OF NEVADA

20 V5 TECHNOLOGIES, LLC, d/b/a COBALT
21 DATA CENTERS,

Case No. 2:17-cv-02349-KJD-NJK

22 Plaintiff,

[PROPOSED] DISCOVERY
23 v.
PLAN AND SCHEDULING
24 ORDER

25 SWITCH, LTD., a Nevada limited company;
SWITCH BUSINESS SOLUTIONS, LLC, a
26 Nevada limited liability company; SWITCH
COMMUNICATIONS GROUP L.L.C., a
Nevada limited liability company; SWITCH,
INC., a Nevada corporation,

SPECIAL SCHEDULING
27 REQUESTED

28 Defendants.

Under Federal Rule of Civil Procedure 26(f) and Local Rule 26-1, plaintiff V5 Technologies, LLC, d/b/a Cobalt Data Centers (“Cobalt”), through its counsel, Bryan Merryman, Catherine Simonsen, Scott Bogatz, and Kerry Kleiman, and defendants Switch, Ltd., Switch Business Solutions, LLC, Switch Communications Group L.L.C., and Switch, Inc. (“Switch”), through their counsel, Chris Miltenberger, conducted a discovery-planning conference on October 12, 2017, and hereby submit to the Court the following proposed Discovery Plan and Scheduling Order:

1. Statement of the Nature of the Case

Switch is a provider of colocation data center services. Colocation data centers allow organizations to operate their critical computing infrastructure (typically, servers, storage, and/or networking equipment) in a purpose-built and managed facility, rather than incur the capital expenditures and risks associated with housing this equipment (and the underlying data) internally. The basic offerings of colocation data centers are space, power, cooling, and telecommunications services. Cobalt opened a colocation data center in Las Vegas in 2013 and closed operations at the end of 2015.

Cobalt alleges that Switch monopolized and restrained trade in the Las Vegas high-end colocation data center market and excluded Cobalt and other competitors. Cobalt alleges this conduct violated Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, Nevada Revenue Statute § 598A.060; and the Nevada common law that prohibits intentional interference with contractual relations and intentional interference with prospective economic advantage.

Switch denies these allegations.

2. Description of the Principal Factual and Legal Disputes in the Case

The relevant product and geographic market(s) in which Switch and Cobalt competed during the relevant time period;

Whether Switch had market and monopoly power in the relevant market;

Whether Switch engaged in the conduct alleged;

Whether Switch entered into one or more unlawful agreements that injured Cobalt;

Whether Switch’s alleged conduct and agreements constituted exclusionary conduct;

1 Whether Switch's alleged conduct and agreements restrained trade in a relevant market;

2 Whether Switch's alleged conduct harmed competition;

3 Whether Switch's alleged conduct caused Cobalt to lose customers and go out of business;

4 What caused Cobalt to go out of business;

5 The quality of Cobalt's offerings;

6 Whether Cobalt's injuries stem from competition-reducing aspects of Switch's conduct
7 and are of the kind the antitrust laws are meant to prevent;

8 Whether Cobalt had valid and existing contracts with third parties;

9 Whether Cobalt had prospective contractual relationships with third parties;

10 Whether Switch had knowledge of such contracts and prospective contractual
11 relationships;

12 Whether Switch engaged in intentional acts with the intent and design to disrupt such
13 contracts and prospective contractual relationships;

14 Whether Switch was privileged in such conduct;

15 Whether Switch's conduct disrupted such contracts and prospective contractual
16 relationships and caused Cobalt damages;

17 Whether Switch acted maliciously, fraudulently, and oppressively in disrupting Cobalt's
18 contracts and prospective contractual relationships;

19 Whether and, if so, in what amount Switch's alleged conduct caused Cobalt to suffer
20 damages.

21 Switch further maintains that the following are additional principal factual and legal
22 disputes in this case:

23 Whether either Switch is entitled to attorneys' fees;

24 Whether this lawsuit was brought in bad faith by Cobalt;

25 The applicability and rights inherent in Switch's defenses and counter-claims which have
26 yet to be filed given the pending Motion to Dismiss.

1 **3. Amendment of Pleadings**

2 The parties agree the deadline to file amended pleadings or add parties be set for 90 days
 3 before the close of discovery.

4 Cobalt: Cobalt requests discovery close on January 30, 2019, and therefore requests that
 5 the deadline to file amended pleadings be set for **November 1, 2018**.

6 Switch: Switch requests discovery close on September 28, 2018, and therefore requests
 7 that the deadline to file amended pleadings be set for **June 1, 2018**.

8 **4. Changes to the Timing, Form, or Requirement for Disclosures under Rule
 9 26(a)**

10 Cobalt: Cobalt proposes no changes to the form or requirement for disclosures under Rule
 11 26(a). Cobalt proposes that the deadline to serve initial disclosures should be **December 12,
 12 2017**, which is 14 days after the Court lifted the discovery stay.

13 Switch: Switch proposes the deadline to serve initial disclosures should occur no later
 14 than **January 12, 2018** as Cobalt has already propounded a large number of requests for
 15 production.

16 **5. Discovery Subjects, Deadlines, and Phasing; Expert Disclosures**

17 The parties anticipate that discovery will relate to the claims and defenses identified above
 18 as well as any counterclaims Switch may raise if required to answer. The parties reserve all rights
 19 to seek discovery to the fullest extent permitted under the Federal Rules of Civil Procedure.

20 Switch appeared on October 4, 2017.

21 Cobalt: Cobalt proposes that discovery be bifurcated into two phases: (1) fact, followed
 22 by (2) expert. This is customary and useful in complex antitrust cases such as this one. This
 23 phasing allows all facts to be gathered on issues such as geographic market before the parties'
 24 experts are required to serve reports based in part on such facts. In the parties' Stipulation to
 25 Extend Deadlines, Switch stipulated: "Additional time is warranted to permit Defendants ample
 26 time to research and analyze the issues raised in Plaintiff's Complaint and for the parties to brief
 27 the **complex issues raised by the claims set forth in that Complaint.**" ECF No. 23 at 2
 28 (emphasis added).

1 Cobalt's position is that approximately one year of fact discovery followed by 90 days of
 2 expert discovery is required for discovery. Accordingly, fact discovery should close on
 3 November 1, 2018, and expert discovery should close on January 30, 2019. Cobalt's expert
 4 disclosures and reports should be due on December 1, 2018. Switch's expert disclosures and
 5 rebuttal reports should be due on December 31, 2019. Cobalt's expert reply reports, if any,
 6 should be due on January 30, 2019.

7 Switch: Switch notes that the language quoted by Cobalt in ECF No. 23 was related to the
 8 applicable deadlines, not the instant Discovery Plan and is being taken out of context. Switch
 9 contends the case is not as complex as suggested by Cobalt and objects to the discovery being
 10 bifurcated into two phases. Switch requests that all discovery close on **September 28, 2018** as a
 11 matter of judicial economy and preservation of time. If good cause exists for additional time then
 12 in good faith Switch will entertain Cobalt's request to stipulate to an extension.

13 **6. Interim Status Report**

14 Pursuant to Local Rule 26-3, the deadline for filing the Interim Status Report shall be 60
 15 days before the discovery cutoff date.

16 Cobalt: Cobalt requests discovery close on January 30, 2019, and therefore requests the
 17 deadline to file the Interim Status Report be set for **December 1, 2018**.

18 Switch: Switch requests that discovery close on September 28, 2018 and that the Interim
 19 Status Report be due **July 30, 2018**.

20 **7. Electronically Stored Information**

21 Cobalt: On December 1, 2017, counsel for Cobalt sent counsel for Switch a proposed ESI
 22 Stipulation for inclusion as an exhibit to this Discovery Plan for approval by the Court, based on
 23 ESI stipulations counsel for Cobalt have successfully used and had approved by federal courts in
 24 other cases. Switch deleted reference in Cobalt's draft Discovery Plan to this proposed ESI
 25 Stipulation. Cobalt requests that the Court order the parties to submit to the Court a proposed ESI
 26 Stipulation, or alternative versions from each party, by December 12, 2017. Given Switch's
 27 request for a stay of discovery, initial attempt to move the deadline for initial disclosures to
 28 January 30, 2018, and failure to respond with comments to Cobalt's proposed ESI Stipulation

1 sent on December 1, 2017 (and Stipulated Protective Order sent on November 30, 2017, *see*
 2 ¶ 8(a), *infra*), it appears Switch may intend to use the lack of an ESI Stipulation and/or Protective
 3 Order to delay production of documents. Therefore, Cobalt respectfully submits that a deadline
 4 of December 12, 2017 for the parties to submit a proposed ESI Stipulation to the Court is
 5 warranted.

6 Switch: The Order does not require an ESI. Cobalt has insisted that an ESI be included at
 7 this time. Switch is open to further discussing Cobalt's request but views a request for an ESI at
 8 this time to be premature and will only benefit Cobalt as Cobalt is no longer engaged in any
 9 business. On November 5, 2017 Cobalt deleted Switch's original the language stating the same.
 10 Moreover, Switch agreed to lower the close of discovery from January 30, 2018, to January 12,
 11 2018 as a good faith accommodation and because this date is reasonable given the holiday season.

12 **8. Privilege**

13 The parties agree that the Federal Rules of Civil Procedure and Federal Rules of Evidence
 14 govern issues of privilege or protection.

15 **a. Protective Order**

16 Cobalt: On November 30, 2017, counsel for Cobalt sent counsel for Switch a proposed
 17 Stipulated Protective Order for inclusion as an exhibit to this Discovery Plan for approval by the
 18 Court, based on a protective order approved by this Court in another case (*see Tinder-Howell v.*
 19 *Union Pacific Railroad Co., et al.*, No. 3:15-cv-00317-LRH-VPC (Apr. 27, 2016) (ECF No. 130-
 20 1)). Cobalt requests that the Court order the parties to submit to the Court a proposed Stipulated
 21 Protective Order, or alternative versions from each party, by December 12, 2017. Given Switch's
 22 request for a stay of discovery, initial attempt to move the deadline for initial disclosures to
 23 January 30, 2018, and failure to respond with comments to Cobalt's proposed Stipulated
 24 Protective Order sent on November 30, 2017 (and ESI Stipulation sent on December 1, 2017, *see*
 25 ¶ 7, *supra*), it appears Switch may intend to use the lack of an ESI Stipulation and/or Protective
 26 Order to delay production of documents. Therefore, Cobalt respectfully submits that a deadline
 27 of December 12, 2017 for the parties to submit a proposed Stipulated Protective Order to the
 28 Court is warranted.

1 Switch: The parties are working on a Stipulated Protective Order and Switch proposes
 2 presenting it to the Court once the parties agree on the nature of the same. Switch has only had a
 3 few days to review Cobalt's proposals and Switch has its own language that Courts have
 4 approved in the past that protect the unique nature of Switch's federal contracts and mission
 5 critical services. A protective order is particularly critical in this matter as Switch is the only
 6 party with ongoing operations. Switch notes it needs sufficient time to negotiate a Protective
 7 Order because such an Order will likely be solely dedicated to protecting Switch's trade secrets
 8 and confidential information given the lopsided nature of this suit. A protective order is
 9 particularly material in this case as Switch actively supports several hundreds of federal, state and
 10 enterprise mission critical contracts and because Cobalt has previously admitted to
 11 misappropriating Switch's intellectual property.

12 **9. Limitations on Discovery**

13 Cobalt: Cobalt proposes that the limitations on discovery imposed under the federal and
 14 local rules apply, except that there be no limit on the number of party depositions. Cobalt has
 15 preliminarily identified at least 20 individuals in executive or senior roles at Switch who appear
 16 likely to have unique personal knowledge and information relevant to the litigation. Cobalt
 17 reasonably believes there are numerous other lower-level employees who dealt with Switch's
 18 and/or Cobalt's actual and/or prospective customers, suppliers, vendors, and partners who may
 19 need to be deposed.

20 Switch: Switch proposes that the limitations on discovery imposed under the federal and
 21 local rules apply.

22 **10. Dispositive Motions Deadlines**

23 The parties agree that the deadline for filing dispositive motions should be set for 30 days
 24 after the discovery cutoff date.

25 Cobalt: Cobalt requests discovery close on January 30, 2019, and therefore requests that
 26 the deadline to file dispositive motions be set for **March 1, 2019**.

27 Switch: Switch requests that discovery close on September 28, 2018 and therefore
 28 requests that the deadline to file dispositive motions be set for **October 28, 2018**. Again, Switch

1 agrees to entertain a request to extend the discovery deadline in good faith should good cause
2 exist.

3 **11. Joint Pretrial Order Deadline**

4 The parties agree that the deadline for submitting the joint pretrial order should be 30 days
5 after the dispositive-motion deadline, suspended until 30 days after decision on dispositive
6 motions if dispositive motions are filed.

7 Cobalt: Cobalt requests the deadline to file dispositive motions be set for March 1, 2019,
8 and therefore requests that the deadline to submit the joint pretrial order be set for **March 31,**
9 **2019**, if no dispositive motions are filed, and if dispositive motions are filed, then 30 days after
10 decision on dispositive motions.

11 Switch: Switch requests that dispositive motions be set for August 31, 2018 and therefore
12 requests that the deadline to file the pretrial order be set for **August 1, 2018**. Again, Switch
13 agrees to entertain a request to extend the discovery deadline in good faith should good cause
14 exist.

15 **12. Any Other Orders Under Rule 26(c) or Rule 16(b) and (c)**

16 Cobalt: Cobalt proposes that the deadline to file *Daubert* motions be set for the same
17 deadline to file the joint pretrial order: **March 31, 2019**, if no dispositive motions are filed, and if
18 dispositive motions are filed, then 30 days after decision on dispositive motions.

19 Switch: As noted above, Switch proposes that the deadline to file the pretrial order be
20 **August 1, 2018**, and that the deadline to file *Daubert* motions be set for the same deadline to file
21 the joint pretrial order if no dispositive motions are filed, and if dispositive motions are filed, then
22 30 days after decision on dispositive motions.

23 **13. Meet and Confer Certifications**

24 The parties certify that they met and conferred about the possibility of using alternative
25 dispute resolution processes including mediation, arbitration, and, if applicable, early neutral
26 evaluation. Counsel for Switch advised that any settlement discussions would be premature. The
27 parties will continue to consider the possibility of private mediation as the case moves forward.
28

1 The parties certify that they considered consent to trial by a magistrate judge under 28
2 U.S.C. § 636(c) and Fed. R. Civ. P. 73. The parties do not consent.

3 The parties certify that they considered consent to the use of the Short Trial Program
4 (General Order 2013-01). The parties do not consent.

5 The parties certify that they conferred regarding whether they intend to present evidence
6 in electronic format to jurors for the purposes of jury deliberations and any stipulations the parties
7 reached regarding providing discovery in an electronic format compatible with the court's
8 electronic jury evidence display system. The parties agreed to discuss these topics and prepare
9 stipulations regarding providing discovery in electronic format compatible with the court's
10 electronic jury evidence display system as the case gets closer to trial.

11

12 Dated: December 5, 2017

By: s/ Catherine S. Simonsen
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3 Attorneys for Plaintiff
4 V5 TECHNOLOGIES, LLC, d/b/a COBALT
5 DATA CENTERS

6 Dated: December 5, 2017

7 By: s/ Samuel Castor

8
9
10 Samuel Castor
11 Anne-Marie Birk
12 In-House Attorneys for Defendants
13 SWITCH, LTD., SWITCH BUSINESS
14 SOLUTIONS, LLC, SWITCH
15 COMMUNICATIONS GROUP L.L.C., and
16 SWITCH, INC.

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27
28 **ORDER**

IT IS SO ORDERED.

DATED this _____ day of _____, 2017.

Hon. Nancy J. Koppe

United States Magistrate Judge

PROOF OF SERVICE

I hereby certify that I am employed in Los Angeles, state of California. I am over the age of 18 and not a party to the within action. My business address is White & Case LLP, 555 South Flower Street, Suite 2700, Los Angeles, CA 90071-2433.

On December 5, 2017, I caused the foregoing document(s) to be filed via the Court's CM/ECF system, which will accomplish service on all parties of record through their counsel.

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on December 5, 2017, at Los Angeles, California.

s/ Catherine S. Simonsen
Catherine S. Simonsen